

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH REPUBLIC INSURANCE	:	
COMPANY,	:	No. 16-259C
	:	
Plaintiff,	:	Judge Davis
	:	
v.	:	
	:	
UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	

RESPONSE TO NOTICE OF SUPPLEMENTAL AUTHORITY

On May 17, 2021, the United States Court of Appeals for the Federal Circuit issued its opinion in *Conway v. United States*, No. 2020-1292, 2021 WL 1954841 (Fed. Cir. May 17, 2021) and on June 7, 2021, the Dispute Subclass filed a Notice of Supplemental Authority (“Notice”), Docket No. 125, suggesting that *Conway* resolves key issues in this case.

The Dispute Subclass’ arguments are premature. Pursuant to Fed. R. App. P. 41 and Fed. Cir. R. 41, no mandate will issue until seven days after the time for the filing of a petition for rehearing or petition for rehearing en banc. No such petition is due before 45 days following the appellate court’s entry of judgment, Fed. R. App. P. 40(a)(1), or July 1, 2021. The Court of Appeal’s decision is not final until the mandate issues, which cannot occur until July 8, 2021.

Prior to the expiration of the period for the United States to seek rehearing, various components of the Department of Justice must confer internally and with other executive agencies. And authority to decide whether the United States may seek rehearing lies with the Solicitor General.

If *Conway* becomes final in its current form, the United States requests fourteen (14) days within which to respond substantively to the Notice. Preliminarily, we note that the Court of Appeals did not address the questions of whether the Court has jurisdiction to entertain a

counterclaim when an insolvent insurer sues the United States in this Court or whether statutorily-required interest is available against an insolvent insurer.

If the Court of Appeals grants a petition for rehearing, the United States proposes that the parties submit a joint status report regarding the status of the rehearing.

Respectfully submitted,

Dated: June 8, 2021

BRIAN M. BOYNTON
Acting Assistant Attorney General
Civil Division

RUTH A. HARVEY
Director
Commercial Litigation Branch

KIRK T. MANHARDT
Deputy Director

/s/ Terrance A. Mebane
TERRANCE A. MEBANE
MARC S. SACKS
FRANCES M. MCCLAUGHLIN
PHILLIP SELIGMAN
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
Phone: (202) 307-0493
terrance.a.mebane@usdoj.gov

Attorneys for the United States of America